88-150

Supreme Court, U.S.
FILED
FEB 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JERRY RONALD QUARLES,

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. SHOULD THE TRIAL COURT HAVE GRANTED THE PETITIONER'S MOTION TO QUASH THE INDICTMENT FOR LACK OF JURISDICTION BECAUSE THE PROPERTY IN QUESTION HAD ALREADY BEEN DELIVERED AND THEREFORE WAS NO LONGER IN INTERSTATE COMMERCE AT THE TIME OF THE THEFT AND WHETHER THE DISMISSAL OF PRIOR STATE CHARGES CONSTITUTED A BAR TO FEDERAL PROSECUTION?

II. DID THE TRIAL COURTS REFUSAL TO ALLOW PETITIONER TO INTRODUCE A STATEMENT MADE AT A PRIOR HEARING IN STATE COURT BY THE F.B.I. AGENT IN CHARGE OF THE INSTANT CASE THAT RENDERED AN OPINION ON AN ULTIMATE ISSUE AS TO THE STATUS OF WHETHER THE GOODS IN QUESTION HAD LOST THEIR INTERSTATE STATUS CONSTITUTE SUBSTANTIAL OUTCOME DETERMINATIVE ERROR?

III. SHOULD THE TRIAL COURT HAVE GRANTED THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE GOVERNMENT FAILED TO SHOW THAT THE THEFT OF GOODS WAS WITHOUT THE CONSENT OR PERMISSION OF THE OWNER?

IV. DID THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER TO ARGUE TO THE JURY THAT THERE WAS NO THEFT IN THAT GENERAL MOTORS CONSENTED TO THE TAKING, AND THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER'S JURY INSRUCTION AS TO THEFT CONSTITUTE SUBSTANTIAL OUTCOME DETERMINATIVE ERROR IN THAT IT PREVENTED PETITIONER FROM PRESENTING HIS THEORY OF THE CASE?

V. WAS THE JURY INSTRUCTION ON INTERSTATE COMMERCE GIVEN BY THE TRIAL COURT AN INCORRECT STATEMENT OF LAW, UNNECESSARILY ARGUMENTATIVE, AND PREJUDICIAL TO THE PETITIONER?

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OPINION BELOW

The opinions of the Court of Appeals, reported, are appended hereto. (App. 1 & 2).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 29, 1988. This petition is being filed within sixty days of the date as required by Rule 20.1 of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

The initial Judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 5, 1988. Counsel for Petitioner, pursuant to Federal Rules of Appellate Procedure Rule 35 intended to file a Petition for Re-hearing en banc, but was out of the country when the decision of the Sixth Circuit was rendered and dictated a Motion for Enlarge-ment of Time to file Petition for Re-hearing en banc

and was submitted by his secretary within the fourteen (14) days that the Federal Rule requires. While waiting for the Sixth Circuit Court of Appeals to Rule on his Motion, counsel for Petitioner filed the Petition for Re-hearing en banc along with twenty (20) copies to the Sixth Circuit with a Motion for Leave to File Out of Time pursuant to the Sixth Circuit Internal Operating Procedures Rule 19.11.1. A Judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 29, 1988 denying the Motion for additional time to file the Petition for Re-hearing but it is the contention of the Petitioner that because he followed all the rules of the Sixth Circuit and the Federal Rules of Appellate Procedure, and had filed the Petition for Re-hearing en banc this Honorable Court should treat the Judgment of November 29, 1988 as a denial of the Petition for Re-hearing and, therefore,

allow the Petition for Certiorari to be considered timely filed as the sixty (60) days would have commenced from November 29, 1988 as required by Rule 20.1 of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). This Honorable Court should also take notice that the Sixth Circuit Court of Appeals has issued a Stay of the Mandate pending application to the Supreme Court for a Writ of Certiorari.

STATEMENT OF THE CASE

On April 25, 1986, a Grand Jury in the Eastern District of Michigan indicted Appellant, Jerry Ronald Quarles, charging him with Conspiracy to Steal Goods in Interstate Shipment, in violation of 18 U.S.C. 371, and Theft of Goods in Interstate Shipment, in violation of 18 U.S.C. 659. (R.1: Indictment).

Prior to trial, Defendant moved to quash the indictment for lack of jurisdiction in that a prior dismissal of the same case in state court acted as a bar to federal prosecution pursuant to 18 U.S.C. 659; that the dismissal by a state judge of the same case was binding on the Federal court in that it was res judicata; and that the goods in question had already been delivered, and were therefore not interstate in character. The motion was denied by Judge Newblatt. (Trial transcript Vol. I 10-22; 31-57.)

Defendant moved for a judgment of acquittal pursuant to Federal Rules of Criminal Procedure 29(a) after the United States attorney's opening statement wherein he never mentioned "interstate shipment", or "shipment on the way to", but in fact, stated "material taken from General Motors, from a facility that was General Motors."

Judge Newblatt denied the Motion (Trial transcript Vol. I 113-114).

The motion for judgment of acquittal was renewed at the conclusion of the government's proofs on the grounds that the evidence failed to show that the conspiracy charged in Count One was directed against goods in interstate commerce; that the evidence failed to show that the goods alleged to have been stolen in Count Two were still in interstate commerce at the time of the taking; and that the government had failed to show that the goods were taken without the consent of the owner. This motion was denied. (Trial transcript Vol. VII 805-847).

Defendant submitted his theory of the case to the court along with his proposed jury instructions dealing with theft, and the court refused to allow them, and directed that Defendant could not argue his

theory to the jury. (Trial transcript Vol. VII 839-847; Vol, VIII 868-869).

On August 4, 1986, the jury found Defendant guilty as to Counts One and Two. On December 9, 1986, Judge Newblatt sentenced Appellant to the custody of the Attorney General for two (2) years along with a $5,000 fine. The trial court granted Defendant's Motion for Release Pending Appeal on December 24, 1986.

By Order entered August 5, 1988, the Court of Appeals affirmed Petitioner's conviction. (App. 1).

By Order entered November 29, 1988, the Court of Appeals denied Petitioner's Motion for Leave to File Out of Time a Petition for Re-Hearing En Banc. (App. 2).

FACTS

Appellant, Jerry Ronald Quarles, was one of five (5) defendants charged with Conspiracy to Steal Goods in Interstate Shipment, and Theft of Goods in Interstate

Shipment. The conspiracy Appellant was convicted of was alleged to have been in existence prior to March 26, 1984, and continuing until March 10, 1985. The theft Appellant was convicted of was alleged to have taken place on March 30, 1984.

The instant case is the same case that was dismissed by Judge Michael D. McAra on February 7, 1986 in the District Court for the 68th Judicial District in Michigan. (People v. Jerry Ronald Quarles, 85-508 FY). After the arraignment of the Defendant in Federal Court, counsel for Defendant inquired of Assistant United States Attorney Robert Haviland as to the charges and the evidence in the case. Counsel was told that it was the exact case as that already adjudicated in the 68th Judicial District Court of Michigan, and that all the facts were the same. The discovery materials presented to defense counsel by Mr. Haviland were the same reports and evidence that were

given to counsel in the State case. The overt acts charged in the instant case were the same as those charged in the State case. The witnesses who testified in the instant case also testified in the State case, save two, whose testimony did not add or detract to what was adduced at the State proceeding. After a lengthy proceeding spread out over a nine (9) month period, Judge McAra dismissed all the carges on February 7, 1986. (Order of Acquittal/Dismissal, 68th District Court).

Approximately two months after the state dismissal, an indictment was filed by the United States against Appellant Quarles. The trial commenced on July 17, 1986 and continued through August 4, 1986. Fifteen witnesses testified on behalf of the government.

The government's main witness, Fred Harper, testified that he had notified General Motors a few years prior to the

theft in 1984 of a planned theft from a General Motors engine assembly plant in Pontiac, Michigan. Warren Jeffrey, a security employee with General Motors, was told, and in fact someone from General Motors observed the theft taking place, doing nothing to stop it, not unlike the theft in the instant case. (Trial transcript Vol. I 92-94). Fred Harper also testified that he had set up a plan with the Defendants to steal parts from General Motors, and had tipped off General Motors during the week preceding the theft on March 30, 1984 (Trial transcript Vol. II 122-123). Mr. Harper further testified that at another meeting a few days before March 30, 1984, he met with people from General Motors and the F.B.I., and proceeded to tell them where the theft was going to take place, when the theft was to take place and who would be involved. (Trial transcript Vol. II 124-126). Mr. Harper testified that he knew

General Motors people were watching the theft, and in fact followed the goods all the way from Flint, Michigan to where it was abandoned in Detroit, Michigan. (Trial transcript Vol. II 144, 151-152).

Special Agent Craig Meyer testified that he was part of the surveillance crew on the morning of March 30, 1986 and that he had received information that there was going to be a theft from the Fisher Body plant, and that they knew the names and numbers of the two trailers that were going to be removed from the plant. (Trial transcript Vol. III 282-283). Agent Meyer testified that they had received notice to be involved in the surveillance the day before the theft occurred. (Trial transcript Vol. III 295). Agent Meyer further testified that it was his understanding that it was General Motors property being taken, and that they had come out of the Fisher Body plant. (Trial

transcript Vol. III 298-299). Agent Meyer further testified that General Motors people were involved in the surveillance. (Trial transcript Vol. III 299-300).

Richard Hill, who was terminal manager for Jones Transfer in Flint, Michigan in 1984, testified that Jones Transfer would get its trailers back from General Motors generally within twenty-four hours. (Trial transcript Vol. III 311). Mr. Hall then testified that on occasion General Motors would leave the trailer in the secured yard within the Fisher 1 complex with as many as ten other trailers, not to be unloaded until General Motors needed the parts on them. (Trial transcript Vol. III 312). He further testified that a driver does not need to get any signed receipt that he delivered the trailer to General Motors. (Trial transcript Vol. III 315). Mr. Hall went on to testify that once a trailer had been dropped off at General Motors Fisher Body

plant, he considered that it was General Motor's property. (Trial transcript Vol. III 317). In the instant case, Mr. Hall testified that the Jones trailer had been delivered to General Motors, and that it was under their control. (Trial transcript Vol. III 318).

Leon Somers, the chief of plant security for Fisher Body, Plant Number 1 in 1984, testified that he was aware of the planned theft from Fisher Body on March 28, 1984. (Trial transcript Vol. III 321). Mr. Somers testified that it was his understanding that trailer 3890 was delivered to Fisher Body. (Trial transcript Vol. III 346). Mr. Somer further testified that the trailers were in the possession of General Motors in the secured yard, and that trailers could not be removed without General Motors permission. (Trial transcript Vol. III 348).

Harold Schneider, who was employed by General Motors in their plant security at Fisher Body in 1984, testified that truck drivers usually give their bills to the people on the loading dock, but sometimes when the dock employees are not working, they leave them with the security guards. (Trial transcript Vol. III 368). He further testified that by the security guards accepting the bills and letting the drivers come into the plant and dropping off their trailer, this constituted accepting delivery on behalf of General Motors. (Trial transcript Vol. III 368).

Warren Jeffrey, a director of security and investigations for General Motors, testified that Fred Harper had given him information about thefts from General Motors, and that on one occasion someone from General Motors observed a theft taking place after being told how it was going to happen by Fred Harper. (Trial transcript

Vol. III 378). Mr. Jeffrey testified that arrests and prosecutions came about through the information supplied by Fred Harper. (Trial transcript Vol. III 379).

Larry Marler, senior administrator of security for Fisher Body in 1984, testified that Fred Harper contacted him about a theft that was going to take place from General Motors, and that he met with Mr. Harper on March 23, 1984. (Trial transcript Vol. III 425-426). Mr. Marler testified that he met Fred Harper again on March 26, 1984, along with Warren Jeffrey and agents from the F.B.I., where the entire plan was spelled out, and the assurance given to Mr. Harper that General Motors would pay him Forty Thousand ($40,000.00) Dollars for the information. (Trial transcript Vol. III 429-433). Mr. Marler then testified that the reason the F.B.I. was brought in was because once the materials left the property of General Motors, they had no control over

it, and they were under the impression it was going to leave the State of Michigan. (Trial transcript Vol. III 431).

Larry Hill, who was the foreman on the truck dock at Fisher Body plant Flint, in 1984, testified that while the trailers were in the bull pen within the gates of Fisher Body, that people could go out to the trailers and remove parts as needed, even before they were inventoried. (Trial transcript Vol. IV 529-530; Vol. V 583).

Mr. Hill further testified that it could be days before a trailer is brought to the dock to be unloaded, and that it could not leave without authority of General Motors, and that the trailers were under the complete control of General Motors. (Trial transcript Vol. V 584). Mr. Hill also testified that the lot containing the trailers that people could take things out of before being inventoried could be

characterized as a warehouse. (Trial transcript Vol. V 584-585).

Joseph Magyar, who was president of Kelso Trucking Company, testified that when people at Fisher Body didn't unload the trailer right away, they would keep the bill of lading and the freight bill, but they would not give the driver any receipt showing delivery was made. (Trial transcript Vol. V 600-601). He further testified that no one at Kelso was informed of the theft on March 30, 1984 until after the theft had occurred. (Trial transcript Vol. V 601).

Special Agent Charles Whistler testified that the entire investigation was initiated by General Motors, and that property was going to be taken from General Motors. (Trial transcript Vol. V 658). Agent Whistler in response to a question asking him if it was his understanding that the materials taken were going to be ultimately returned to General Motors,

stated that ideally we would get their property back. (Trial transcript Vol. V 660).

Special Agent Don Reece testified that he was involved in the investigation of Defendant Quarles prior to March 30, 1984, and that the investigation involved the intended theft of two trailers from a General Motors plant in Flint. (Trial transcript Vol. VI 713). The investigation continued after March 30, 1984 and Agent Reece testified that in his discussions with the Defendants, they talked about taking the property of General Motors because two of the individuals worked for or at General Motors. (Trial transcript Vol. VII 798). Agent Reece testified that he personally returned the trailer that was taken from General Motors on March 30, 1984, to Detroit Diesel, a plant owned by General Motors. (Trial transcript Vol. VII 800). He was directed to do so by General Motors

officials, and Agent Reece testified that he was taking back property that belonged to General Motors, and was in their control. (Trial transcript Vol. VII 801).

REASONS FOR ALLOWANCE OF THE WRIT

THE TRIAL COURT SHOULD HAVE GRANTED THE PETITIONER'S MOTIONS TO QUASH THE INDICTMENT FOR LACK OF JURISDICTION AND DIRECTED VERDICT OF ACQUITTAL BECAUSE THE PROPERTY IN QUESTION HAD ALREADY BEEN DELIVERED AND WAS THEREFORE NO LONGER IN INTERSTATE COMMERCE AT THE TIME OF THE THEFT; AND THE DISMISSAL OF PRIOR STATE CHARGES CONSTITUTED A BAR TO FEDERAL PROSECUTION.

A. The Goods In Question Had Already Been Delivered, And Therefore Were Not Interstate In Character.

One essential element of the charges against Petitioner Quarles is that of the interstate character of the property stolen. The property must either be moving in or be a part of an interstate shipment at the time of the theft. The interstate character of the shipment commences when the property is segregated for interstate shipment and comes

into the possession of those who are assisting its course in interstate transportation, and continues until the property arrives at its destination and is there delivered. Section 659 of Title 18 of the United States Code further provides that to establish the interstate commerce character of any shipment, the waybill, or other shipping document of such shipment, shall be prima facia evidence of the place from which and to which such shipment was made.

The goods that were the object of the theft on March 30, 1984 originated in Ottawa, Illinois at the Libby-Owens-Ford Company. The shipping order stated that it was consigned to Fisher Flint #1 Plant in Flint, Michigan, and that it was to be shipped by Kelso Trucking, Inc. Evidence adduced at trial showed that the trailer loaded with automobile windshields was delivered to Fisher Flint #1 on March 29,

1984. The trailer was left in the secured parking lot of Fisher #1, and the documentation of delivery was left at the loading dock.

United States v. Yoppolo, 435 F.2d 625 (6th Cir. 1970), and Winer v. United States, 228 F.2d 944 (6th Cir. 1956) hold that for the purpose of 18 U.S.C. 659, the interstate character of a shipment ceases when the deliveree has accepted delivery, and that there is no violation of that section after the interstate character of the shipment ceases.

The government relied throughout the proceedings on United States v. Luman, 622 F.2d 490 (10th Cir. 1980); United States v. Williams, 559 F.2d 1243 (4th Cir. 1977); and United States v. Wills, 593 F.2d 285 (7th Cir. 1979). It was the governments contention that the goods were still in interstate commerce because:

1) General Motors had not signed either the freight bill or the bill of lading.

2) General Motors had not unloaded the windshield from the trailer.

3) The trailer was not located at the unloading dock, but was kept in a holding area within General Motor's property.

4) General Motors had not inventoried the trailer to determine if the goods shipped matched the bill of lading and freight bill.

5) The trailer had arrived at the plant within twelve hours of the theft.

The government's reliance on Luman, Williams and Wills is distinguishable from the instant case in that General Motors used goods in unloaded trailers in their guarded lot prior to any inventory being taken or any goods being unloaded, and paid for the windshields and for the cartage without ever signing the original bill of lading or

freight bill, and when told of the impending theft, they never notified Libby-Owens-Ford or Kelso Trucking. Also, there was no dominion and control over the goods in the Luman, Williams and Wills cases, unlike the case at bar where testimony clearly showed that General Motors was in complete control over the goods, and more importantly, and the most distinguishing factor between the government's authorities, General Motors knew about the theft approximately one week before it happened, and acutally allowed the theft to take place. (emphasis added)

The goods were delivered to General Motors, and they were under their control, as testified to by numerous General Motors employees at the State court proceedings. That this fact was not at issue was corroborated by the United States' own Indictment at paragraph 7 which reads as follows:

> "About March 30, 1984 Anthony Kendrick, using a tractor moved two semi-trailers loaded with automobile parts belonging

to General Motors Corporation from the Fisher Body Plant #1 in Flint, Michigan to a storage lot on Saginaw Street in Flint, Michigan."

The Sixth Circuit, in its decision of August 5, 1988, incorrectly concluded that the shipment in the instant case had not lost its interstate character even in spite of the fact that it had been delivered to the General Motors plant and was under the dominion and control of General Motors. The panel disregarded its rulings in the case of United States v. Yoppolo, 435 F.2d 625 (6th Cir. 1970) and Winer v. United States, 228 F.2d 944 (6th Cir. 1956) which held that for the purpose of 18 U.S.C. Section 659 the interstate character of a shipment ceases when the deliveree has accepted delivery. The panel in its decision relied on the case of United States v. Petit, 841 F.2d 1546 (11th Cir. 1988) as being similar to the case at bar. The panel stated in its decision that the interstate shipment

in Petit was used by the Federal Bureau of Investigation in a sting operation after the shipment had already reached its destination but that for the purpose of 18 U.S.C. Section 659 the shipment retained its interstate character throughout the duration of the sting operation.

The Petit case and the instant case are easily distinguished, and in fact the panel incorrectly interpreted the decision of Petit. In Petit at 1551 the Court stated that "the sting involved the carrier, not the purchaser."

The electronic equipment which had been shipped from Tennessee, had not yet been delivered to its Miami purchasers, and was used in the sting operation with the consent of the carrier. In the case at bar the carrier had already dropped off the trailer and the "so-called sting" was done with the consent of the purchaser after it had lost its interstate character and had

already been delivered. The decision of this panel only confuses the issue as to what constitutes delivery and it is Appellants' contention that this panel incorrectly applied Yoppollo and Winer.

As related to the conspiracy alleged in Count One, the government conceded that if the goods involved in Count Two had lost their interstate character, then likewise any goods which were the object of the conspiracy charged would have lost their interstate character. (Trial transcript Vol. VII 844-846). Assuming arguendo that the government did not make that concession, it was still never shown that the conspiracy was directed at goods in interstate shipment. Testimony clearly showed that the object of any theft was to be property from General Motors. Fred Harper stated that he took property from General Motors for years, and that General Motors was aware of it. Two of the Defendants worked either for or

at General Motors, and everyone's understanding, which includes Petitioner, General Motors, and the F.B.I., was that property from General Motors was going to be taken.

In order for a conviction for conspiracy to be sustained there must be an "anti-federal" intent by the Defendants. United States v. Cimini, 427 F.2d 129 (6th Cir. 1970). There must be proof of an agreement, express or implied, to commit an offense against the United States. Pereira v. United States 347 U.S. 1, 12, 98 L.Ed 435, 74 S.Ct. 358 (1954); Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed. 2d 1503 (1959). The Defendants had no intention of stealing any goods in interstate shipment, the only evidence adduced showed that the purpose of the theft was to take property under the complete dominion and control of General Motors.

Petitioner's motion for judgment of acquittal as to both counts should have been granted by the court.

B. A Judgment Of Conviction Or Acquittal On The Merits Under The Laws Of Any State Shall Be A Bar To Any Prosecution Under 18 U.S.C. 659 For The Same Act Or Acts.

Petitioner was charged with Conspiracy to Steal Goods in Interstate Shipment, 18 U.S.C. 371 and Theft of Goods in Interstate Shipment, 18 U.S.C. 659. 18 U.S.C. 659 in part states:

> "A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof."

The Defendant was charged in State court with Conspiracy to Commit Larceny Over

$100, and Larceny Over $100. This matter was adjudicated over a nine month period, and was ultimately dismissed by Judge Michael McAra on February 7, 1986 after all the witnesses had testified, and briefs had been submitted to the Court.

Approximately two months after the State dismissal, an indictment was filed by the United States against Appellant Quarles. After the arraignment of the Defendant in Federal Court, counsel for Defendant inquired of Assistant United States Attorney Robert Haviland as to the charges and the evidence in the case. Counsel was told that it was the exact case as that already adjudicated in the 68th Judicial District Court of Michigan, and that all the facts were the same. The discovery materials presented to defense counsel by the government, as well as exhibits, were the same reports and evidence that were obtained by counsel in the State case. The overt

acts charged in the instant case were the same as those charged in the State case. The witnesses who testified in the instant case also testified in the State case, save two, whose testimony did not add or detract to what was adduced in the State proceeding.

Judge Newblatt's concern was whether the dismissal by Judge McAra was a judgment of dismissal on the merits. (Trial transcript Vol. I 34-35). The order signed by Judge McAra was an Order of Acquittal/ Dismissal. According to Black's Law Dictionary (5th Ed.), 1979, the definition of acquittal is "one legally acquitted by a judgment rendered otherwise then in pursuant of a verdict, as where he is discharged by a magistrate because of the insufficiency of the evidence, or the indictment is dismissed by the court or a nol. pros. entered." Judge McAra ruled that the evidence presented by the People was insufficient to show that a crime was committed, and accordingly

dismissed the case, and entered his order, which served as a judgment in the case.

Whether the judgment was on the "merits" was of concern to Judge Newblatt. According to Black's Law Dictionary (5th Ed.), 1979, "The word "merit" as a legal term is to be regarded as referring to the strict legal rights of the parties." Webster's Dictionary of the English Language (Unabridged), 1977, defines merits as "actual qualities or facts, good or bad; as, decide the question on its merits. The issue as to whether a crime was committed goes to the heart of the charge, and the proceedings before Judge McAra were on the merits. Judge McAra rules that the evidence presented to the court by the people was sufficient to show that no crime was committed, and therefore discharged the Defendant.

Under the Code of Criminal Procedure in Michigan, if it appears to the magistrate at

the conclusion of the preliminary examination either that an offense has not been committed or that there is not probable cause for charging the accused therewith, he must discharge the accused (emphasis added). M.C.L.A. 766.13. The prosecutor may obtain a review in the circuit court of the magistrate's dismissal of the charge, and in deciding whether an examining magistrate acted properly in refusing to bind over an accused person, the circuit court reviews the action of the magistrate on the record made before the magistrate at the preliminary examination. Genesee County Prosecutor v. Genesee Circuit Judge, 215 N.W. 2d 145, 391 Mich. 115 (1974). Such a review is a judicial review, searching the record to determine whether the magistrate's decision is in accord with the law, facts, and reason of the matter, and accordingly, the circuit court may reverse the magistrate's decision to refuse to bind over

an accused only for abuse of discretion, and may not properly substitute its judgment for that of the magistrate as if it were reviewing the magistrate's decision de novo. Genesee County Prosecutor v. Genesee Circuit Judge, supra.

After a lengthy nine month preliminary examination, Judge McAra concluded that there was no probable cause to believe that the Petitioner had committed the crime charged. The complete lack of probable cause is equivalent to a directed verdict for the Defendant at trial. The judge obviously found the evidence insufficient to send the case to trial.

Petitioner stridently argues that such a finding by the District Court judge is an appealable ruling; but becomes final when the prosecution fails to properly appeal. To rule otherwise would allow state and federal prosecutors the ability to engage in a form of "conspiratorial" forum shopping in

which these cases found wholly lacking in evidentiary support in one court could then be brought in another court. Therefore Petitioner maintains that such a finding by a judge in a state court should necessarily bar the institution of the same charges in federal court as the principles of res judicata apply. Petitioner's conviction should have been reversed.

C. The Dismissal By Michigan District Judge Michael McAra Is Binding And Is Res Judicata

Article IV, Section 1 of the United States Constitution and 28 U.S.C. 1738 requires that full faith and credit shall be given in every court in the United States and its Territories and Possessions. Thus judgment rendered by a State court bars a subsequent action in the federal court on the same cause of action. Angel v. Bullington, 330 US 183, 67 S Ct 547, 91 L.Ed 832 (1946); Kremer v. Chemical Construction Corp., 102 S.Ct. 1883, 72 L.Ed 626 (1982).

The requirement of full faith and credit to judicial proceedings has been closely associated with the doctrine of res judicata. A judgment that is res judicata in the jurisdiction that rendered it is res judicata in all courts, state and federal. Kremer v. Chemical Construction Corp., supra; Angel v. Bullington, supra.

Since 28 U.S.C. 1738 requires that judicial proceedings "of any court of any such State, Territory or Possession" shall be accorded full faith and credit" in every court within the United States and its Territories and Possessions", there is a statutory duty imposed upon federal courts to accord full faith and credit to the judicial proceedings of State courts. Kremer v. Chemical Construction Corp., supra.

In the instant case, the dismissal by Judge McAra was a final judgment, in that it was never appealed, and acts as being res

judicata. It is therefore res judicata in federal courts, and the fact that the Federal Bureau of Investigation lost its case at the state level did not mean that they could relitigate the same facts in federal court. They should have been collaterally estopped from doing so, and barred from reinstituting this matter at the federal level.

The Sixth Circuit incorrectly based the Appellants' argument on double jeopardy when in fact Appellants argued that on the merits was not an issue of double jeopardy but one of res judicata, and that even if considered double jeopardy arguendo, that the Appellants in their brief clearly showed that jeopardy had in fact attached. The panel incorrectly concluded that the legislative history of 18 U.S.C. Section 659 reflected that the primary purpose was to provide "effective remedies for developed evils with which the state authorities seem

wholly incompetent to deal." A reading of the entire congressional record dealing with H.R. 16450 shows that the intent of the bill was only to address the question of venue, and that federal jurisidiction would only take effect when venue was difficult or impossible to prove. That is not, nor has it ever been, the case in Michigan. Congressional Record-Senate, January 10, 1913, pages 1780-1782.

The panel never dealt with the meaning of "on the merits" which is included in 18 U.S.C. Section 659, and the major over-riding question that has to be addressed by this Honorable Court is what the definition of "on the merits" and what significance the dismissal at the state court level had as determining the definition of "on the merits." The issue as to whether a crime was committed goes to the heart of the charge and the proceedings at the state court level were on the merits. The dismissal of

the state case was a final adjudication on the merits and the judgment should have been given a res judicata effect and the panel should have concluded that the federal government was barred from indicting Appellant under 18 U.S.C. Section 659. The Sixth Circuit stated that a decision at the preliminary examination stage does not bar subsequent indictment and prosecution, and cites United States v. Scarlotta, 214 F.2d 807 (3rd Cir. 1954) among others. In the Scarlotta case the court dealt with a plea of guilty as opposed to a judgment of conviction. Scarlotta stated that the word judgment indicates action by the court and the holding of the court in Scarlotta would seem to indicate that a judgment of conviction, which would have been an action by the court, would have constituted a bar to any prosecution under 18 U.S.C. Section 659, not unlike the case at bar where the District Court judge acquitted the

Defendants and signed a judgment of acquittal.

The issue of what is meant by "on the merits" was then dismissed on the basis of interpretation of language in Collins v. Loisel, 262 U.S. 426, 43 S.Ct. 618, 67 L.Ed. 1062 (1923). The Collins court stated that a preliminary exam is not a trial and discharge by a magistrate is not an acquittal. The Sixth Circuit then used this finding in relation to double jeopardy to dismiss the Petitioner's contentions on appeal.

However, the Sixth Circuit error lies in the fact that res judicata is not double jeopardy and the 5th Amendment double jeopardy clause does not supplant res judicata. Collins v. Loisel, supra.

THE TRIAL COURTS REFUSAL TO ALLOW PETITIONER TO INTRODUCE A STATEMENT MADE AT A PRIOR HEARING IN STATE COURT BY THE F.B.I. AGENT IN CHARGE OF THE INSTANT CASE THAT RENDERED AN OPINION ON AN ULTIMATE ISSUE AS TO THE STATUS OF WHETHER THE GOODS IN QUESTION HAD LOST THEIR INTERSTATE STATUS CONSTITUTED SUBSTANTIAL OUTCOME DETERMINATIVE ERROR.

Petitioner Quarles has contended throughout these entire proceedings that the goods in question had been delivered, and were therefore not intersate in character. The jury had to make a decision as to whether or not the goods had been delivered, and whether once delivered that the goods ceased to be interstate in nature. Appellant argued that because the F.B.I. originally adjudicated the same case in State court, that the reasons for seeking relief in the State court would be critical in helping to determine a major fact in issue. Special Agent Whistler had testified in State Court:

> "My understanding, at the time, was that when the determination

was made between attorneys in the matter, government attorneys, state attorneys, GM attorneys, that . . . that this material lost its interstate status. We now had a case that was not a federal case; it was a local case."

Special Agent Whistler was involved in this case, both State and Federal, right from the beginning. He had personal knowledge of almost everything that transpired, including the decision as to which jurisdiction to seek in order to bring the charges against the Defendants. He had made a statement to a Michigan State Police Officer, who was the officer-in-charge of the State case, although Agent Whistler was in actuality the officer-in-charge, stating:

"that much research had been done on the legality of whether this was a theft of an interstate shipment or not, and it was found that when the trailers were dropped and delivered in the secured area of GM, they had been, technically, received and were no longer interstate shipment."

Petitioner requested that he be allowed to cross-examine Agent Whistler relative to his statements regarding interstate status. (Trial transcript Vol. V 545-560). The request for this motion was pursuant to Rule 701 and Rule 704(a) of the Federal Rules of Evidence. Rule 701 provides:

> Opinion Testimony by Lay Witness
> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 704(a) provides:

> Opinion on Ultimate Issue
> Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Agent Whistler's testimony would have been very helpful to the jury in determining the question of interstate shipment, which was the "ultimate issue" in this case. To have been denied this opportunity by the

court to pursue the testimony of Agent Whistler constituted substantial outcome determinative error because it prevented the jury from considering all the evidence.

THE TRIAL COURT SHOULD HAVE GRANTED THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE GOVERNMENT FAILED TO SHOW THAT THE THEFT OF GOODS WAS WITHOUT THE CONSENT OR PERMISSION OF THE OWNER.

Upon completion of the government's case, Petitioner made a motion for judgment of acquittal, in that the government had not shown that the goods were still interstate in character, and that there was no showing that the theft of the goods was without the consent or permission of the owner. (Trial transcript Vol. VII 839-847).

All of the witnesses at trial corroborated the fact that General Motors was aware of the intending theft at least one week prior to the taking of property from Fisher Body, and that Fred Harper was going to be participating in the theft.

There was even testimony from Fred Harper that he had set up the plan, and had tipped off General Motors as to what was going to happen. (Trial transcript Vol. II 122-123).

When one looks to the definition of theft, they are always referred to the crime of larceny. A key element in proving an illegal taking is that it must be without the owners consent. In the instant case, it was the intention of General Motors to allow the goods to be taken, even though they could have prevented the taking. It was General Motors contention that they would follow the goods once they were taken, in hopes of apprehending the takers in the act and getting their property back. A larceny is not committed if an owner consents to the taking of his goods solely for the purposes of apprehending the taker in the commission of the act, or a third person in receiving the goods after they have been taken, for as it has been aptly said "the object of the

law is to prevent larceny by punishing it, not to procure the commission of a larceny that the offender may be punished." 52A C.J.S. Larceny 24.

Fred Harper had been co-operating with General Motors for a number of years previous to March 30, 1984, and in this particular case both the F.B.I. and General Motors gave their approval for Mr. Harper to follow through with his plan. The payment of $40,000.00 by General Motors to Fred Harper, and their monitoring of his activities created an agency relationship between themselves. If an agent of the owner co-operates with the taker in planning the scheme by which the taking is effected, there is no larceny. 52A C.J.S. Larceny 249b). If the goods are taken by the supposed accomplice (Fred Harper) and handed to the intended thief, or if the supposed accomplice assists in the taking, then there is no larceny. 52A C.J.S. Larceny 24b.

Fred Harper was never charged with any crimes for theft of General Motors property either before or as a result of the theft on March 30, 1984. In fact, General Motors paid him to carry out the plan. Mr. Harper invented the scheme and acted as an accomplice, but in actuality he was the agent for General Motors.

Thus the Court should have granted Petitioner's motion for a judgment of acquittal as to both counts.

THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER TO ARGUE TO THE JURY THAT THERE WAS NO THEFT IN THAT GENERAL MOTORS CONSENTED TO THE TAKING, AND THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER'S JURY INSTRUCTION AS TO THEFT CONSTITUTED SUBSTANTIAL OUTCOME DETERMINATIVE ERROR IN THAT IT PREVENTED PETITIONER FROM PRESENTING HIS THEORY OF THE CASE.

Upon completion of the trial, and prior to the jury being charged, Petitioner attempted to submit his theory of the case to be considred by the jury. It was, and is, Petitioner's contention that there was

no theft of interstate goods, in that General Motors had given their permission to have their property removed from the premises. (Trial transcript Vol. VIII 868-869). The request was denied by Judge Newblatt, and counsel for Petitioner was directed not to argue to the jury his theory of the case. (Trial transcript Vol. VIII 869).

Appellant was charged with Theft of Goods in Interstate Shipment. Appellant contends that a crucial element to be proven is that the taking, stealing or carrying away of the property was without the consent or permission of the owner. The court allowed an instruction giving this definition to the jury, but prohibited counsel for Appellant to argue to the jury whether the evidence presented by the government satisfied that element of the charge.

This was a critical argument to make to the jury, in that the question of consent was a fact to be determined by the trier of fact, and the failure of the court to permit the Appellant to argue his theory of the case, and to discuss the element of consent constituted substantial outcome determinative error because it prevented the jury from considering all of the evidence.

THE JURY INSTRUCTION ON INTERSTATE COMMERCE GIVEN BY THE TRIAL COURT WAS AN INCORRECT STATEMENT OF LAW, UNNECESSARILY ARGUMENTATIVE, AND PREJUDICIAL TO THE PETITIONER THEREBY NECESSITATING REVERSAL.

Petitioner requested that the court give an instruction on interstate commerce from Devitt & Blackmar, Federal Jury Practice and Instructions, Third Edition, 46.08, which reads as follows:

> "The interstate character of the property stolen is an essential element of this offense. The property must either be moving in or part of an interstate shipment at the time of the theft.

> Property is in interstate commerce if its movement originates in one state and passes through another state, even though it returns to the state from which it started.
>
> The interstate character of the shipment commences when the property is segregated for interstate shipment and comes into the possession of those who are assisting its course in interstate transportation, and continues until the property arrives at its destination and is there delivered.
>
> Section 659 of Title 18 of U.S.C.A. further provides that:
>
> > `To establish the interstate ... commerce character of any shipment ... the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.'
>
> `Prima facie evidence' means sufficient evidence, unless outweighed by other evidence in the case. In other words, waybills, or bills of lading, or other shipping documents such as invoices, if proved, are sufficient to show the interstate commerce character of the shipment, in the absence of evidence in the case which leads the jury to a different or contrary conclusion."

The trial court chose to expand on that instruction, over the strenuous objections of the Defendants. (Transcript "Discussion

of Jury Instructions," August 1, 1986, 2-7)) and gave its own version (trial transcript Vol. X 1002-1006). The courts instructions included facts that the government relied upon in order to prove that the goods taken on March 30, 1984 were still part of an interstate shipment. The insturction given by the court was as follows:

> "Here there is no question but that the Kelso Trailer #5227 was a part of an interstate shipment at some point and the question here is whether it was still a part of that shipment at the time of the alleged theft.
>
> The determination of whether a shipment is an interstate shipment or has lost its status as an interstate shipment as indicated before is determined by whether or not it has arrived at its destination and is there delivered. If it has arrived and has been delivered, it has lost its character as an interstate shipment.
>
> Whether or not it has been delivered at any given point in time is essentially a practical determination depending upon the relationship between the consignee, the consignor and the carrier, and the indicia of interstate commerce at the time the alleged theft occurred. It is not necessary that the goods be actually moving in interstate commerce at the time of the alleged

theft. So whether goods are a part of an interstate shipment depends not only upon the foregoing, but also upon their physical location when stolen, what further actions will or will not be needed to complete the transaction between the carrier and the consignee, whether the goods are loaded or unloaded, whether they are transported into the consignee's inventory, what shipping documents, if any, need to be signed, whether the consignee had accepted the goods and/or assumed full dominion or control over the goods, and any and all other facts in evidence which may bear on the issue.

Here the government claims that the undisputed and established evidence shows:

1. That at the time of the alleged theft, GM had signed neither the freight bill nor the shipping order.

2. That at the time of the alleged theft, the goods had not been unloaded from the trailer.

3. That at the time of the alleged theft, the trailer with the goods had not been spotted at GM's unloading dock but was being held in a holding area within GM's property.

4. That at the time of the alleged theft, no one in behalf of GM had actually compared the contents of the trailer with the shipping order to determine if the shipment contained all it was supposed to contain.

5. The trailer had arrived at the Fisher Body Plant of GM within 12 hours of the alleged theft.

I instruct you that on those facts you may find beyond a reasonable doubt that the trailer and its contents were a part of an interstate shipment at the time of the alleged theft.

On the other hand, you are not obligated to do so and you may take into account any and all facts in evidence bearing upon this issue in making your determination as to whether or not the government has or has not proven this element beyond a reasonable doubt.

If the goods involved were a part of or constituted an interstate shipment of freight or express, and the accused unlawfully took the goods from a motor truck, with the intent to convert them to his own use, as alleged in the indictment, then the offense charged was complete, even though the goods were later recovered." (Trial transcript Vol. X 1002-1006).

Petitioner argues to the court that since the government's claims were allowed, to make it fair, Petitioner's facts should have also been included. (Transcript of Instruction Conference, August 1, 1986, 5-6). The facts that Defendants wanted included were the following:

One, that there was no requirement that any document need be signed before General Motors accepts.

Two, General Motors placed the trailer company and the number on the computer when the trailer passed the guard shack.

Three, General Motors had contents of the shipment on the computer.

Four, General Motors has on prior occasions used parts from trailers directly before the trailer had been brought to the loading dock or unloaded or inventoried.

Five, General Motors took control of trailers and would not allow removal from their property without a pass.

Six, General Motors did not notify the consignor, that is, Libby-Owens-Ford, of the loss.

The trial court denied defense counsel's objections with the statement, "I found that none of these factors rise to the same level ... that the factors in the government's claim, and I think that concludes discussion on that." (Transcript Discussion of Jury Instructions, August 1, 1986, 5-7).

As long as the jury instructions fairly and adequately cover the issues presented, the formulation of the instructions or choice of language is a matter within the trial court's discretion. United States v. Miller, 771 F.2d 1219 (9th Cir., 1985). On the other hand, the trial court should insure that the facts are accurately discussed and, if the evidence is summarized, both sides are analyzed. United States v. Tello, 707 F.2d 85 (4th Cir., 1983). Failure to do so will result in reversal. United States v. Ragghianti, 560 F.2d 1376 (1977).

In the present case, the trial court's instruction on interstate commerce did not fairly present the factual issue involved, because it emphasized the government's position while blatently ignoring the facts favorable to the Defendant's position. The instruction given by the court so prejudiced the Petitioner that the effect was to grant

the government a directed verdict. No case exists in american jurisprudence which allows Petitioner to be prosecuted by a directed verdict for the prosecution.

It is not a trial judges position to rule on sufficiency of criminal defendant's evidence. This would be a gross abuse of discretion.

United States v. Mann, 811 F.2d 495 (9th Cir. 1987) explicitly states the duty of the trial court in responding to defense requests for jury instruction. The court stated:

> "The court's failure to give jury instructions regarding the defendant's theory of the case is reversible per se if the theory is legally sound and supported by the evidence. United States v. Escobar DeBright, 742 F.2d 1196, 1201 (9th Cir. 1984). Whether a jury instruction misstates elements of a statutory crime is a question of law subject to de novo review. United States v. Douglass, 780 F.2d 1472, 1475 (9th Cir. 1986).

It is clear that Petitioner was grossly prejudiced by the trial court's refusal to

even refer in the smallest way to his requested jury instruction. The judge then went on to deny Petitioner an impartial statement of the case and only stated the government's proofs. There is no way that the government can now claim that there was no prejudice. A trial court commits reversible error in a criminal case when it fails to give an adequate presentation of a theory of defense. United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986) (citing United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976) cert. den. 426 U.S. 922, 96 S.Ct 2630, 49 L.Ed. 2d 376 (1976)). Therefore, Petitioner's conviction must be reversed.

CONCLUSION AND RELIEF REQUESTED

The above arguments clearly show that the 6th Circuit's affirmance of Petitioner's conviction conflicts with the precedent of this court as well as the 6th Circuit's own precedent, and also that the 6th Circuit has

decided an important question of federal law which has not been, but should be, settled by this court, to wit: what constitutes a judgment of acquittal "on the merits" that would bar prosecution under 18 U.S.C. 659.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

Charles H. Gabe

Howard J. Wittenberg

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NOS. 86-2004/2029
86-2123/2170

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY D. KENDRICK (86-2004);
WAKEFIELD COOK (86-2029);
MARTIN PETER JERMALOWICZ (86-2123);
JERRY RONALD QUARLES (86-2170),

Defendants-Appellants.

Before: MERRITT, KRUPANSKY and NELSON,
Circuit Judges

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel for defendants Kendrick, Cook and Quarles and plaintiff. The cause of defendant Jermalowicz was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgments of the said district court in this case be and the same are hereby affirmed.

No costs taxed.

ISSUED AS MANDATE: December 7, 1988

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

_____

Clerk

NO. 86-2170

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff=Appellee	:	
	:	
vs.	:	ORDER
	:	
JERRY RONALD QUARLES,	:	
	:	
Defendant-Appellant	:	

Upon consideratoin of the motion of the appellant for additional time to file his petition for rehearing,

It is ORDERED that the motion be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk